THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Kassem

Respondent: North Tees and Hartlepool NHS Foundation Trust

Heard at: Teesside Justice Hearing Centre **On:** 7 to 10 November 2022 with deliberations on 5 and 6 January 2023

Before: Employment Judge Morris

Members: Mr S Moules
Mr S Wykes

Representation:
Claimant: Ms B Criddle, one of His Majesty's Counsel
Respondent: Ms L Quigley of Counsel

RESERVED JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is that if the parties fail to reach agreement between them, it will make an order under subsection 124(2)(b) of the Equality Act 2010 that the respondent pay compensation to the claimant, which will be calculated having regard to the principles outlined in the Reasons below.

REASONS

Context

1. This hearing was to determine the remedy that would be awarded to the claimant by the Tribunal arising from its judgment on liability that had been sent to the parties on 18 January 2021 ("the Liability Judgment").

2. Such a hearing to determine remedy was originally listed for hearing on 23 and 24 February 2022 but, on application by the respondent, that hearing was postponed given the extremely late service by the claimant on the respondent

of a significantly amended Schedule of Loss for which no explanation was or has been given. That remedy hearing was converted into a Preliminary Hearing in the Summary in the Record of which it is recorded, amongst other things, as follows:

> "During this hearing an offer was made on behalf of the respondent to pay to the claimant by 9 March 2022 an interim payment of £50,000 gross on account of any remedy award that the Tribunal might ultimately make in respect of injury to feelings and general damages. The claimant accepted that offer."

The hearing, representation and evidence

3. The claimant was represented by Ms B Criddle, KC, who called the claimant to give evidence. Additionally, the Tribunal had witness statements from individuals giving evidence on his behalf: namely, Hadeel Al Khazaali, one of the claimant's sisters, and Prof G McLatchie who had worked closely with the claimant for some eight years. By consent, neither of those witnesses attended the hearing (that being particularly in circumstances where neither the respondent nor the Tribunal wished to ask any questions of Prof McLatchie) but the Tribunal nevertheless brought their evidence into account notwithstanding that it might not be expressly referred to below.

4. The respondent was represented by Ms L Quigley of Counsel, who called two employees of the respondent to give evidence on its behalf: namely, Mrs E Morrell, Employee Relations Manager, and Mrs C Brown, Administration Manager.

5. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising in excess of 2370 pages. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

6. It is considered appropriate to record at the outset that the claimant gave evidence well, particularly given his ill-health, which was apparent during the hearing and was corroborated in documentary evidence. The respondent's witnesses also gave helpful evidence in a clear and non-partisan fashion. The Tribunal was particularly grateful to Mrs Morrell for producing, overnight and without professional assistance, a supplementary witness statement with supporting documents that shed light on the respondent's approach to payment in respect of on-call work sessions, primarily for surgeons.

7. In this respect the Tribunal also records that the evidence on behalf of the respondent was limited to these two witnesses and it did not hear evidence from others who might have been in a better position to challenge more directly the evidence of the claimant. Instead, the respondent's approach was to rely upon questions being asked of the claimant by Ms Quigley in cross examination. On a number of occasions Ms Criddle submitted that such questions could not be asked in circumstances where the subject matter of the questions had not been

addressed in evidence on behalf of the respondent. To allow such questions would, she said, be to "ambush" the claimant. The Tribunal was satisfied, however, that Ms Quigley could ask such questions provided that they were fair and were relevant to the issues in the case. This approach of the respondent did, however, leave the Tribunal without substantive evidence on behalf of the respondent in a number of instances, which was not desirable: a point that came into focus with regard to the amount of the payment in respect of on-call sessions, which necessitated Mrs Morrell's production of the supplementary witness statement referred to above.

8. A final introductory point is that at this remedy hearing the representatives were agreed that the acts of direct race discrimination, racial harassment and detriments for making protected disclosures that had been held by this Tribunal to be well-founded were the ten acts that each of them had listed in their respective written submissions; albeit during the hearing it was agreed that there had been nine separate acts. The Tribunal returns to this point at paragraphs 56.17 and 56.19 below. In this regard, the Tribunal adopts the approach of Ms Criddle that in these Reasons, words such as "discriminatory", "discrimination" and the like are used to encompass all such acts of discrimination, harassment and detriment.

Events after the Liability Judgment

9. Following the promulgation of the Liability Judgment the claimant received correspondence from the respondent's Interim Joint Chairman on 5 March (383) and 20 April 2021 (384). The Tribunal accepts the claimant's evidence that that correspondence minimizes its findings in the Liability Judgment. In particular, in the second letter the conclusion of the panel that the respondent had set up to review that Judgment was said to be that, "it was disappointing and most regrettable that the Trust had found itself in this position". Amongst the actions that were listed, which were said to address or remedy the learning identified from the Judgment it was recorded, "No formal action to be taken against any parties as a result of the Tribunal findings however robust feedback and support moving forward to be provided." Towards the conclusion of the second letter it is stated, "In summary, I apologise most sincerely on behalf of the Trust for the areas identified within the Tribunal Judgment where the Employment Tribunal found us to be at fault. Whilst the review identified that all parties had the best of intentions to manage issues and situations arising in the most appropriate way, we acknowledge that this has, in part, fallen short of the positive people practices within which we promote and identify with as an organisation."

10. Other outcomes of the respondent's consideration of the Liability Judgment included letters from the respondent's Chief Executive to Ms Dean (2262) and Mr Agarwal (2264), which are in identical terms. She summarised themes that had been identified including, "A lack of understanding of cultural differences and awareness may have contributed to the style and approach adopted in aspects of case management." Each of the recipients was informed that she had considered the Liability Judgment and their "unblemished employment history with the Trust and value and contribution provided to our patients along

with the application of the Trust's Just Culture in reaching a decision." The letters concluded, "I acknowledge that the past months have been particularly challenging both personally and professionally yet you have continued to deliver first class health care. I thank you for this commitment and look forward to our collective learning and improvement as a Trust moving forward."

11. The Tribunal considers that there was no qualitative difference between the letters to the claimant, who succeeded in his claim, and the above two employees both of whom were implicated in the discriminatory treatment identified in the Liability Judgment. Indeed, the Tribunal considers that the claimant was justified in feeling aggrieved that the respondent's letters to him did not go further and, for example, assure him that the perpetrators identified in the Liability Judgment would be interviewed formally and (if found warranted) would be warned, either in a disciplinary context or informally, as to their future conduct. More particularly, there is no evidence before the Tribunal that the respondent provided "robust feedback" as is referred to in the letter to the claimant. It is perhaps for these reasons that the isolating and harassing treatment etc asserted by the claimant is said to have continued.

12. This gave rise to the claimant presenting to the employment tribunal, on 4 October 2021, a further claim against the respondent: claim number 2501580/2021 (2334). At risk of over-simplification, that further claim related to the response of the respondent to the Liability Judgment, which he considered to be inappropriate and inadequate. That claim was to be considered by a differently constituted employment tribunal but, under the auspices of ACAS, a settlement agreement was reached between the parties and others on 12 September 2022 (the "COT3") (2360).

13. Amongst other things, the COT3 records that, subject to the claimant complying with his obligations, including that he would withdraw his further claim (which is defined in that agreement as the "Proceedings"), the respondent agreed as follows:

    13.1 To pay to the claimant "in full and final settlement of the Proceedings the sum of £69,000 as payment in relation to injury to feelings".

    13.2 To provide the claimant with a written apology to be published on the respondent's intranet.

    13.3 To offer the claimant "a permanent locum consultant contract in an elective role in conjunction with his SAS job plan" and, in this connection:

        13.3.1 treat him as if he had been on a locum contract since September 2018;

        13.3.2 pay him back-pay from September 2018 on a scale of YC72 point 13 (Consultant Contract) of £16,800 minus appropriate deductions.

    13.4 To support the claimant "with his application for CESR, if at some future point the Claimant decides to make such an application".

13.5 To arrange mediation between the claimant and Mr Agarwal.

14. The terms of the COT3 are important in relation to this remedy hearing as their effect is such that this Tribunal either need not consider matters that would otherwise have been before this hearing (such as in relation to the claimant's basic pay and pension) or they can be brought into account in our decision including as to a potential impact on any award made to the claimant in respect of injury to feelings.

Anonymity

15. In the Liability Judgment is explained the Tribunal's approach at that time in respect of the identity of persons referred to in these proceedings. Since then, although the considerations in rules 31 and 50 of the Employment Tribunals Rules of Procedure 2013 ("the Rules") remain the same, the case law in this area has developed such that the Tribunal considered this question afresh. In doing so it had regard to rule 50(2) of the Rules and sought to balance relevant rights contained in the European Convention on Human Rights, which are incorporated into UK law by the Human Rights Act 1998; namely the rights to a fair trial contained in Article 6 and the right to respect for private and family life contained in Article 8 against the right to freedom of expression contained in Article 10. It also brought into account recent developments in case law including guidance in the decisions in Frewer v Google EA-2021-000690-BA and Dr Piepenbrock v London School of Economics and Political Science [2022] EAT 119.

16. Having reviewed all relevant matters, the Tribunal decided that, with two exceptions, it would continue to adopt the approach it had adopted at the liability hearing for the reasons explained in the Liability Judgment. In short, that those persons who had been witnesses in either the liability or remedy hearings in these proceedings should be named but those who had not been witnesses but had been referred to by those witnesses should not be named but should be referred to by their title and the first initial of their surname or where more than one person has the same initial for their surname, to use also the first initial of their first name. The exceptions referred to are that the Tribunal considers it both necessary and appropriate to refer by name to Dr Bradbury who was the psychiatrist jointly-instructed to produce psychiatric reports in relation to this remedy hearing and Dr Al-Asady to whose correspondence Dr Bradbury refers at some length in the second of her reports.

The claimant's complaints

17. As detailed in the Liability Judgment and summarised at paragraph 57 of that Judgment, the Tribunal had found certain of the following complaints of the claimant to be well-founded:

17.1 The respondent had directly discriminated against him on grounds of race contrary to sections 13 and 39 of the Equality Act 2010 ("the 2010 Act").

17.2 The respondent had harassed him contrary to sections 26 and 40 of the 2010 Act.

17.3 The respondent had subjected him to detriment on the ground that he made a protected disclosure contrary to section 47B of the Employment Rights Act 1996 ("the 1996 Act") with reference to sections 43A to 43C of that Act.

The issues

18. The claimant had produced a list of issues running to 8 pages but, in any event, the issues for determination were well summarised in the schedules of loss and the counter-schedule of loss that had been produced by the respective parties. As each of the documents referred to in this paragraph is a matter of record their content need not be set out fully in these Reasons but, instead, will be addressed in the record of the Tribunal's consideration below.

Findings of fact – the claimant's evidence

19. Unlike the approach it adopted in the Liability Judgment, the Tribunal does not consider that there is merit in setting out at length at this stage of these Reasons details of and making findings of fact in respect of all of the witness evidence. Instead, while the Tribunal fully considered and brought into account in coming to its decision all of the evidence before it, both documentary and oral, many of its findings that are relevant to the remedy issues are either referred to in this section of these Reasons or will be incorporated into the section headed, "Consideration and further findings of fact". That said, it is appropriate that the Tribunal should record at this juncture the following findings of fact in relation to the claimant's evidence either as agreed between the parties or found by the Tribunal on the balance of probabilities.

20. The claimant first addressed the impact upon him of his suspension from emergency on-call duties in September 2018 and his permanent removal from the on-call rota in March 2020. He referred, for example, to such removal rendering his job non-viable and depriving him from the formal accreditation of attainment of competencies necessary to progress to permanent consultant grade. He explained the essential basis of his working time in his substantive role and undertaking regular locum work at both associate specialist grade and as a consultant, and that the locum work had ceased when he was permanently removed from the rota in March 2020. Not least given its findings in the Liability Judgment Tribunal accepted this evidence of the claimant.

21. For the reasons stated in his witness statement, the claimant disputed the respondent's contention that he would not have done locum work after September 2018 because of a business plan in July 2017 to replace the residential medical officer ("RMO") out of hours and weekends position at Hartlepool Hospital with an advanced nurse practitioner post. In this respect, the Tribunal prefers the evidence of Mrs Brown that from October 2013 until October 2018 the respondent had an arrangement that covered out of hours and weekends shifts at the University Hospital of Hartlepool with RMOs but

locum doctors were required to cover vacancies, which was expensive and harder to arrange than using doctors employed by the respondent. In these circumstances, in July 2017 Mrs Dean had put forward a business case (400) proposing replacing the RMO system with Advanced Nurse Practitioners, which was accepted by the respondent with a phased implementation starting on 17 October 2018. From then until October 2019 there were ad hoc RMO shifts available and, from December 2019, there have been no RMO shifts available. The Tribunal accepts Mrs Brown's evidence that, as a consequence, after September 2018 the claimant did not undertake any more RMO shifts.

22. The claimant also disputed the respondent's contention that he would not have carried on doing additional work because of concerns that he was working too many hours. Additionally he said that he would have the opportunity of doing on-call locum shifts at neighbouring Trusts.

23. The disciplinary investigation (which the Tribunal considered at length in the Liability Judgment) had a significant impact upon him not least given his clean record, which was compounded by the medical director, Dr Dwarakanath, breaching his confidentiality on three occasions. He had become very stressed and anxious, his sleep was badly affected and he felt completely overwhelmed by the need to respond to the respondent, which seemed to have limitless resources to pursue him. In light of its decision in the Liability Judgment, particularly as recorded at paragraph 28, the Tribunal accepts this evidence of the claimant.

24. As a result of the discrimination his career had been damaged forever and he had suffered permanent damage to his mental health necessitating taking daily medication to manage depression, anxiety and sleep disturbances. This had also destroyed his life on a personal level. Drawing on the findings of the Tribunal in the Liability Judgment, the claimant detailed the psychiatric impact upon him of both the racial discrimination and whistleblowing detriments that he had suffered. As a result of raising his grievances he was isolated and discriminated against in the Directorate. He was persistently sad and had physical symptoms of headaches, muscular pain and tension, and changes in sleep patterns even when tired. The effect had been immense; he was lethargic and felt exhausted. He had feelings of guilt and shame and withdrew from his family. He had been severely depressed and commenced treatment after having approached his GP in July 2019.

25. Obtaining documents in response to a subject access request impacted seriously on his mental health and he suffered from horrendous nightmares. One which he repeatedly experienced involved Prof M squeezing his neck tighter and tighter while those who had fabricated the allegations against him watched and laughed progressively louder. He began to have suicidal thoughts as the only way to control the nightmares. He had had some counselling and when that did not work he commenced medication. His blood pressure has been raised. He had been unable to do emergency and on-call duties as a result of the suspension and the change in his job plan and that inability now continued due to his ill health.

26. Some of his colleague surgeons avoided him completely and do not talk to him, which is very isolating; for example, he is not afforded the normal courtesies extended to others when the work of a surgeon preceding him in theatre overruns thus impacting on his own theatre sessions. He will need some long-term psychiatric help. Matters such as the delay in the investigation, the breaches of confidentiality and rumours circulating among hospital staff have caused him to avoid mixing with people and he has become less sociable, feeling helpless and isolated.

27. Senior managers had approached this matter in a vindictive manner. They had ample opportunity to settle this case keeping in mind their knowledge about his deteriorating mental status but failed in their duty of care towards him. During the liability hearing, questioning trying to discredit him caused additional irreparable mental scars. Since that hearing he has continued to be subject to the same harassment and unfavourable treatment.

28. As a result of continued mental illness, his physical health has deteriorated in the last year. He has been diagnosed with high blood pressure, suffers from gastro-oesophageal reflux symptoms and has been told by his GP that he is at high risk of developing stroke and heart attack. He takes four different medications that have the side effects listed in his witness statement. The respondent ignored advice from the occupational health consultant on 4 November 2019 that the investigation process should be completed as soon as possible. He believed that his career would be shortened due to his ill-health and will end in early retirement, and that his mental and physical health will continue to deteriorate for years to come.

29. The Tribunal accepts the evidence as recorded at paragraphs 24 to 28 above, which was largely unchallenged, subject to the following observations:

    29.1 The claimant's evidence recorded at paragraph 26 is corroborated by the reports of Dr Bradbury.

    29.2 Also in respect of that paragraph 26, the claimant has been compensated for the isolation and continued harassment that is referred to in the COT3.

30. The claimant had been planning to stay in work until he was at least 70 years of age (28 February 2031), which he would like to have done to support his two sons through university and beyond. On balance of probabilities, the Tribunal does not accept this evidence, which is contrary to the claimant's previous position that he intended to retire at 67 and his having told Dr Bradbury that he intended to retire in his late 60s. The Tribunal also takes note of Ms Quigley's submissions that there is no evidence of any surgeon working beyond the age of 65 years and pension contributions are now capped.

31. The claimant relied upon the two expert psychiatric reports that the parties had jointly commissioned from Dr Bradbury to which the Tribunal returns below.

32. The claimant has received treatment from a consultant psychiatrist, Dr Al-Asady, who started the claimant on a different and more efficacious

antidepressant. He had reviewed the claimant monthly in June, July and August 2022 on a private basis. There had been no real improvement thus far and his next scheduled appointment would be in February 2023. He expected requiring bi-annual reviews for the foreseeable future. Weekly psychotherapy CBT sessions ended in July 2022 and had only been of minimal benefit. He was on a waiting list for further sessions and understood that he required another 20 sessions of trauma-focused CBT and EMDR to help him with the traumatic events he had experienced. He also recently accessed support through the NHS England Speak Up and Support Scheme, which had commenced on 20 September 2022 and includes five psychological coaching sessions. The Tribunal accepts this evidence of the claimant on which he was not challenged.

33. There had been a significant impact on his earnings as a result of the discriminatory treatment.

34. The claimant detailed issues arising after the Liability Judgment which included that, following a case review, he had received a letter from the interim chairman of the respondent. The claimant considered that the letter appeared to minimise the impact of the Liability Judgment and perpetuated the discrimination against him.

35. Particularly distressing was that the letter appeared to give equivalence to the health and well-being of all the parties involved including those who were responsible for the discriminatory conduct. Although it had been acknowledged that "it was disappointing and most regrettable that the Trust had found itself in this position", there had been no recognition that there must have been serious failures including breaches of the respondent's equality and whistleblowing procedures for such serious findings to be made by the Tribunal. Discrimination is a breach of the respondent's disciplinary and conduct policies and he could not understand why no action had been taken against those responsible. That failure had heightened the hurt he had suffered. It appeared that the respondent had decided to protect those who had discriminated against him, which gave him no confidence that lessons have been learned and aggravated the injury he had suffered. Notwithstanding the statement that he was considered a valued employee he did not feel valued; on the contrary he was more marginalised and isolated than ever. Although an apology had been contained in the letter, it had been marked as strictly private and confidential and a private apology has no weight. There had been a clear lack of remorse and a failure to demonstrate remediation by, for example, undergoing a process to change behaviour. Given the findings of the Tribunal as set out in the above section headed "Events after the Liability Judgment", it accepts this evidence of the claimant.

36. What the claimant referred to as being "aggravating factors" included the respondent not taking actions in relation to the following: recommendations made by Mr Tulloch (as recorded in the Liability Judgment); the breaches of confidentiality by Dr Dwarakanath; those involved in the discrimination, which was an example of continuous direct racial discrimination. He felt that he was treated as an inferior human being while the superior racial group had immunity. He was asked to communicate with people who refused to communicate with

him and Mr Agarwal withdrew from mediation while Mr Bhaskar and Mr Gopinath had refused to mediate. All three completely avoided him. In this regard the claimant also pointed to the findings made and inferences drawn by this Tribunal in its Liability Judgment in relation to the respondent's internal procedures and the time taken to conclude those procedures. In the context of its findings in the Liability Judgment, the Tribunal accepts this evidence.

37. In September 2022 the respondent had amended the claimant's job title to locum consultant albeit only in an elective capacity and he is still not doing any on-call work. This was backdated to 20 September 2018 and his pay had been adjusted to that of a locum consultant resulting in a payment of back pay of £16,800 gross to cover the period 20 September 2018 to 30 September 2022. His PAs remained unchanged at 11.5 (10 whole time plus 1.5 SPA) and his duties remained the same as those of an associate specialist. He still did not have any meaningful role at Directorate or Trust level compared with his colleagues who had been appointed in the last few years who hold significant managerial roles. In the period up to February 2022 Mr Agarwal had appointed individuals into different Directorate roles without discussion or communication with the team. The claimant was not informed of the changes and was not given any role. The Tribunal accepts this evidence as much of it is factual based upon the content of the COT3 and the remainder was not challenged.

38. The claimant has summarised his interactions with occupational health during the period 5 September 2019 to August 2021, which being a matter of record, the Tribunal accepts. He had found the physicians to be supportive but felt that the respondent's managers had not listened to the advice.

39. As a result of the discrimination the claimant had suffered and the impact of his physical and mental health he is permanently unfit to undertake emergency and on-call duties. He does not have the mental stamina or fortitude to undertake such work. Being denied the opportunity of being on the on-call and emergency rota has resulted in his ability to apply for other jobs being restricted. Without recent experience he could not and cannot apply for other jobs elsewhere, which had been acknowledged by Dr Bradley who referred to the disadvantage he would face on the open labour market. The discrimination he had experienced led to him no longer having the confidence to do emergency surgery, which had been his passion. He does not have the necessary capacity to make decisions under pressure or work unsocial and long hours through the night. The Tribunal accepts this evidence, which again was largely unchallenged.

40. In 2015 the claimant felt that he had good support from the then Clinical Director for Surgery and had started getting together all the documents he needed to make an application for a certificate of eligibility for specialist registration ("CESR") to be placed on the GMC's specialist register, which is a precondition for substantive appointment as an NHS consultant. He was ready to submit his application in September 2017 but could not do so with a prospect of success unless he had supportive references. Had the claimant submitted his application in September 2017 he estimates that it would have taken six months to have been approved by the GMC and, especially given recruitment issues in

the North East, he is confident that he would have secured a consultant post with the respondent or elsewhere by 2018 – 2019. Had he been appointed as substantive consultant he would have supplemented his income by doing additional theatre sessions for NHS patients operated upon in private sector hospitals, which he understands are paid at £750 per theatre session. The Tribunal does not make any findings of fact in these respects at this stage but returns to this issue in the section of these Reasons headed, "Consideration and further findings of fact".

Reports of Dr Bradbury

41. The parties jointly instructed Dr Bradbury to produce an expert report in respect of these proceedings. In what turned out to be her first report dated November 2021 (255) she explained as follows:

> "I am instructed to inform the Employment Tribunal with respect to it's task to now determine the following issues:-
>
> 1. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
>
> 2. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
>
> 3. What injury to feelings has the detrimental treatment for protected disclosure caused the Claimant personal injury and how much compensation should be awarded for that?"

42. Dr Bradbury's report was prepared for and on the joint instructions of both parties, it is a matter of record and was understandably not challenged on behalf of the respondent. In these circumstances, the Tribunal need only record that at the beginning of her report Dr Bradbury reviewed the following: the history of relevant matters (including the claimant's background history, medical history and psychiatric history); the claimant's GP log and GP correspondence; the claimant's occupational health records. Some matters that the Tribunal particularly notes that arise from Dr Bradbury's review of the claimant's psychiatric history are as follows:

42.1 When the claimant in September 2018 realised that he was under investigation "he suddenly began to feel suicidal and went to the river".

42.2 When Prof M told him he was suspended "he felt suicidal".

42.3 His "relationships with colleagues deteriorated. He felt isolated at work. …. Colleagues withdrew from contact and would only talk to him in certain circumstances."

42.4 On discovering documents when preparing for the liability hearing that indicated that "there had been a structured plan to dismiss him. He began to experience more regular and intense suicidal thoughts."

42.5 The claimant described himself as “not the same person …. withdrawn, miserable, sad, lacking in energy”. “His sleep is disturbed.” “He feels his confidence has been significantly reduced and he feels worthless. He becomes anxious about the simplest things. He feels very guilty that he has not been the father he would like to have been to his children over the last three years and feels that he has abandoned them. He hates that they have to share his failure “my daily living is a torture”. He is hopeless for the future and that it will be impossible to regain what he had. He sees no future. He eats little and does not care for himself in the way he did previously.”

42.6 “His concentration is impaired …. he is no longer innovative.”

42.7 “He described the difficulties he faces within his marriage.” “His libido is low and his relationship has suffered significantly.”

42.8 “At work, colleagues will not associate with him openly and will only talk to him in secret. He is marginalised. He sees that the other protagonists have not been disciplined and he faces the status quo. Furthermore he feels that his colleagues are vindictive and are simply “waiting for me to make a mistake so they can exaggerate.””

42.9 “He has continuously felt suicidal and knows that the danger will come when he loses insight. He stated that he does not go out of the house alone as there may be some attractive opportunity with respect to suicide. Suicide is never far from his mind.”

43. Having set out what is referred to as a Mental State Examination of the claimant Dr Bradbury then expressed her Opinion. The Tribunal has had regard to the entirety of Dr Bradbury’s report but, repeating that it is a matter of record that has been accepted by both parties, it considers it proportionate only to extract here key points that it draws from the Opinion section of the report (278), in each case first setting out in italic print the five points that Dr Bradbury was instructed to cover (260).

The precise nature and diagnosis of the medical condition

43.1 “Mr Kassem is suffering from a depressive episode of moderate severity. ICD 10 Code F32.1.”

43.2 “Mr Kassem has been made ill by the situation that happened to him at work and the discrimination, injury to feelings and detrimental treatment he took to the Tribunal.”

Any treatment that Mr Kassem has received or is likely to receive, detailing the nature of treatment and the effect that such treatment has had in the past and is like you have in the future.

43.3 "In my opinion, Mr Kassem's depressive episode is now chronic and has been undertreated. There is a risk that this will continue to be the case as he has been offered more of the same treatment going forward."

43.4 "Unfortunately, without a considerable amount more support, and indeed despite this, Mr Kassem is a significant suicide risk, even more so if he can not salvage his career and re-establish what he has lost."

43.5 "He has dedicated himself to surgery and a life in which his patients came first, in order to make sense of the trauma he experienced around them. Without such an outlet, he is more at risk of suicide now than he was earlier in his depressive episode when he was fighting for what he believed was his future as a consultant in sight."

43.6 "If he engages with a consultant psychiatrist in private practice then there may be an opportunity for inpatient treatment which provides intensive support, regular review of medication and intensive psychological therapy."

How long has the medical condition had this impact and for how long is it likely to have this impact?

43.7 "Mr Kassem had an acute psychological reaction to his meeting in September 2018 when he was suspended. He became acutely suicidal and described feeling shocked with a rush of blood to the head. He has had recurrent nightmares about this encounter. Although I do not consider that Mr Kassem suffers from PTSD, it is clear that the news he heard that day was a significant blow to him. His mental health has deteriorated since then. There has been a gradual deterioration with stepwise deteriorations at times of further significant blows. Thus whereas in September 2018 Mr Kassem suffered an understandable although extreme reaction to the outcome of that meeting, at that time, *had the decision been reversed* then his injury feeling would have recovered. At this point in time, the injury to feelings, hurt, humiliation etc *are not reversible*. Indeed, for the reasons outlined above, his depressive episode has become more severe." [*Note: the emphasis in this excerpt has been added by the Tribunal.*]

What is the prognosis for the future? In your report please describe how the prognosis has been effected by any medical treatment that has been or is being received.

43.8 "Mr Kassem has suffered a depressive episode for approximately two and a half years and is therefore, by definition, chronic. One factor contributing to this chronicity is under treatment. In as much as length of episode predicts chronicity then the undertreatment has contributed to this chronicity."

43.9 "For the avoidance of doubt, in my opinion, Mr Kassem's depressive episode would go in to remission with robust, regular, more intense and specialist treatment than he has had so far."

43.10 "Assuming that the Tribunal accepts that Mr Kassem has not previously suffered a depressive episode as is his evidence, then, once an individual has had one episode, the risk of a further episode is in the region of 40%, which is higher than the risk of a first depressive episode for an individual."

The extent to which, as a result of the injuries sustained, Mr Kassem's working capacity is or has been restricted, and whether he is at any disadvantage in the labour market.

43.11 "See above. Mr Kassem is able to continue to work as he is undertaking routine non-emergency surgery that he has performed many times before. As a result of his depression he does not feel confident to do emergency surgery which has been his passion as this requires decision making under pressure and working unsocial and long hours often through the night."

43.12 "His working capacity is restricted in two ways at present. Firstly as a result of his depression which is affecting his concentration and his confidence. Secondly, he is now unable to work in the capacity he was in September 2018 when he was undertaking emergency surgery as he has not practised those skills since then."

43.13 "Finally, in my opinion, there are a number of ways in which Mr Kassem is disadvantaged on the labour market. As a result of his depression he would not have the necessary confidence and self-belief to be competitive at interview. Secondly, as [*an*?] associate specialist post, traditionally was a personal appointment of a non-career grade doctor to a position that recognised that they did not have the qualifications or personal circumstances to take on a consultant position but could be recognised for their skills. Remuneration was higher than other non-career grade positions. A similar position would therefore be nigh on impossible to find. Thirdly, medicine is a small defensive world and having been a whistle blower would be a distinct disadvantage on what is never entirely an open labour market despite legislation.

44. Dr Bradbury was jointly instructed by the parties to produce a second expert which she did in September 2022 (2186). Similar to her approach in her first report, Dr Bradbury set out her review of updated GP records and GP correspondence, a treatment update from the claimant, a clinical update, details of the claimant's relationships at work and her mental state examination. An aspect of her review of GP correspondence, which the Tribunal considers of importance, relates to three letters from Dr Al-Asady, the consultant psychiatrist seen by the claimant on a private basis, the content of which it has brought into account.

45. Once more on the basis that Dr Bradbury's second report is a matter of record that has been accepted by both parties, the Tribunal considers it proportionate only to extract here key points that it draws from the Opinion section of the report (2198), in each case again first setting out in italic print the five points that Dr Bradbury was instructed to cover (2188).

The nature and impact, if any, of the treatment that Dr Kassem has received since November 2021 or is likely to receive, detailing the nature of the treatment and the effect that such treatment has had in the past and is likely to have in the future.

45.1 "There has been no real improvement thus far."

45.2 "In my opinion, there is still room to be hopeful that there can be at least some relief in his symptoms with medication and intense support. However, realistically, until either his prospects and relationships change within the Trust or he leaves an untenable position, the prospects of a significant resolution of his present disorder is unlikely. His work situation is a potent maintaining factor for his depression and in such circumstances to expect full remission from treatment is unrealistic.

Despite these treatments, thus far, Mr Kassem actually feels worse with respect to his mood."

For how long has the medical treatment had this effect and for how long is it likely to have this effect?

45.3 "It is some 11 months since I examined Mr Kassem last and there has been no progress.

The treatment thus far has had little impact and I believe that he continues to be under treated.

I would expect a better response to treatment once he has been able to extricate himself from his current situation, although, at present a satisfactory solution has not presented itself in his mind."

What is the prognosis for the future? In your report, please describe how the prognosis is affected by any medical treatment that has been or is likely to be received, and please state whether you consider Mr Kassem's symptoms are likely to enter remission in the future and, if so, when?

45.4 "Mr Kassem has suffered a depressive episode for approximately three and a half years now and his condition, therefore, remains chronic. One factor contributing to this chronicity is under the treatment. The other factor is the very potent maintaining factor of his work and marital situation. In as much as length of episode predicts chronicity then both the ongoing undertreatment and the ongoing untenable position at work have contributed to this chronicity." This paragraph is a direct quote from Dr Bradbury's report but the Tribunal considers that her phrase "under the treatment" should read "undertreatment", which would be consistent with the term used in the third sentence of this paragraph.

Please state on the balance of probabilities whether Mr Kassem will be fit in the future to carry out emergency surgery and, if so, when?

45.5 "From a psychiatric perspective, Mr Kassem indicates that certain symptoms of his depressive disorder are influential in his current inability to feel that he could not cope with the demands of undertaking emergency surgery. These are his indecisiveness, his "*brain fog*", his lack of self-confidence, poor concentration, his loss of energy and stamina and a tendency to be anxious about outcomes. Therefore, he will be fit from a psychiatric perspective to undertake emergency surgery once he achieves remission of his depression.
Notwithstanding, should the opportunity arise that Mr Kassem were able practically to work towards undertaking surgery in the future, it is my opinion that this would be an alleviating factor for his depressive disorder."

Please state whether, in your opinion, Mr Kassem is likely to remain at a disadvantage on the open labour market, and, if so, please describe how?

45.6 "From a psychiatric perspective his current level of depression would be evident at a competitive interview. He would be unlikely to succeed as a result of those symptoms and his pervasive sense of loss of faith in himself and his colleagues. His fear of new challenges would also place him at a disadvantage.

In my first report I have also noted a number of professional factors that would put him at a disadvantage. In this report, Mt Kassem mentioned the obstacle of professional references. Again, in my opinion, these professional factors are contributing to the maintenance of his depressive episode as they are contributing to him being disadvantaged on the open labour market."

46. By letter of 16 February 2022, the claimant's solicitors wrote to Dr Bradbury referring to a paragraph in her first report a relevant excerpt from which is set out at paragraph 43.6 above. She was asked, "Are you able to provide me with more information about the kind of in-patient treatment you envisage and at what sort the private facility and what the likely costs of such treatment might be? (765). The solicitors' letter continued, "I would be most grateful for any supplementary information you can provide so I can add this to the compensation my clients seeks at next week's hearing." The Tribunal notes that that letter was sent a mere four working days before the date upon which this remedy hearing was intended to take place; perhaps it is little wonder then that it was forced to postpone that hearing.

47. Dr Bradbury replied on 18 February 2022 (766) providing the information that had been sought from her.

The statutory law

48. Section 124 of the Equality Act 2010 provides as follows:

124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
(b) order the respondent to pay compensation to the complainant;
(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant]1 of any matter to which the proceedings relate.

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but
(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may—

(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
(b) if no such order was made, make one.

49. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Submissions

50. After the evidence had been concluded the parties' representatives made oral submissions by reference to lengthy written submissions (for which the Tribunal records its appreciation), which addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law.

51. The Tribunal first records, however, that Ms Criddle began her submissions with what she described as "a complaint" in relation to the respondent's presentation of its case, which she described as having been utterly unreasonable. She submitted that, in particular, the counter-schedule of loss that the respondent had previously produced had been vague and it had not been until 2 o'clock that afternoon that a detailed counter-schedule had been presented within Ms Quigley's written submissions. She continued that she and the claimant had not had sufficient time to check the respondent's figures, which contrasted with the respondent having had the claimant's updated schedule of loss since 24 October. Thus, she maintained, the parties were not on an equal footing and it was not fair on the Tribunal. In these circumstances, Ms Criddle invited the Tribunal to consider only the principles relating to remedy and not the "pounds, shillings and pence". She also wished to record that she reserved her position in respect of costs.

52. The Tribunal had some sympathy with these submissions and, in fact, had already intimated earlier in the hearing that it might limit its Judgment to the principles in issue rather than making the detailed calculations. In these circumstances, for the most part that will be the approach in this Judgment. That might enable the parties to agree figures between themselves but, if not, a further remedy hearing will be required.

53. Returning to the submissions themselves, it is not necessary for the Tribunal to set them out in detail here because they are a matter of record (especially as each representative made her oral submissions by reference lengthy written submissions) and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to our decision.

Consideration and further findings of fact

54. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically

mentioned below), the Tribunal records the following further facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

54.1 For ease of reference, the Tribunal first repeats contextual findings made in the Liability Judgment. The respondent is an NHS Foundation Trust providing a variety of healthcare services throughout the North Tees area including accident and community services. It has hospitals in Hartlepool ("University Hospital Hartlepool" or "UHH") and Stockton on Tees ("North Tees"). The claimant is a general surgeon from Iraq. He was appointed to work for the respondent in August 2002. He works within the Directorate of Surgery, Urology and Outpatients ("the Directorate") within which there are five departments: Upper GI, Urology, Colorectal, Emergency and Breast.

54.2 Against the above background, the Tribunal turns to consider the heads of claim advanced by the claimant in his schedule of loss dated 24 October 2022 (2307).

Past financial losses

54.3 The first such head of claim is referred to as past financial losses being primarily the claimant's pay plus a fairly modest claim for reimbursement of medical expenses. As to loss of pay, the claimant relies upon alternative bases as set out below. The Tribunal has set out these alternatives by reference to Ms Criddle's submissions acknowledging that they are dealt with in the reverse order in the claimant's schedule of loss and in Ms Quigley's submissions.

Option one

54.3.1 Primarily that, but for the discriminatory treatment to which he was subject, the claimant would have obtained his CESR and obtained employment as a substantive consultant on 1 September 2018 or, at the very latest, on 1 September 2019. In this respect, therefore, the claimant had lost earnings from the following:

54.3.1.1 Loss of additional programmed activities ("PAs"), including PAs and an availability supplement for being on the consultant on-call rota.

54.3.1.2 Loss of additional remuneration from undertaking locum consultant work.

54.3.1.3 Loss of income from undertaking private work.

Option two

54.3.2 In the alternative, he would have remained as an associate specialist. In this respect, therefore, he has lost earnings from the following:

54.3.2.1 Not being on the middle grade on-call rota.

54.3.2.2 Not earning additional remuneration from undertaking locum work at either mid-grade or consultant level.

54.4 At paragraph 10.9 of the Liability Judgment, it is recorded that at a meeting attended by the claimant and Mr Bhaskar on 20 April 2012 Mr Bhaskar offered, amongst other things, to encourage the claimant "to apply for Article 14; that being a route to gain entry to the specialist consultant register and thence appointment to a substantive consultant position." It seems that the claimant responded to that encouragement by preparing an evidential portfolio of documents (969) that contains details of his qualifications, skills and experience.

54.5 Prof McLatchie, has considered that portfolio in relation to which his evidence, which was wholly uncontested by the respondent, included the following:

54.5.1 "He [*the claimant*] was an exemplary surgeon, and he was highly skilled. I would say he was one of the most talented surgeons I had seen work during my career. In 2010, I had an acute emergency in which [*the claimant*] performed surgery on me. I allowed him to do this because I felt very safe under his care."

54.5.2 "From my professional experience and reading the CESR guidance I believe [*the claimant*] has met all the collegiate criteria in order to obtain the post of substantive consultant."

54.5.3 However, he "would have needed to obtain a reference from the Clinical Director of North Tees and Hartlepool Hospital, the Medical Director, or a colleague from the Upper GI team. From what I can see, there is no professional reason why [*the claimant*] should not have been able to obtain a referee."

54.6 The Tribunal finds that evidence in relation to the claimant's skills and talents to be extremely positive. In light of that evidence, it is satisfied that the scale of the damage done to the claimant by the discriminatory acts as found in the Liability Judgment is clear. Further, the Tribunal finds that it is highly likely that the claimant's portfolio would have been sufficient to satisfy the requirements to enable him to obtain his CESR. In her skeleton argument, Ms Quigley conceded this point on behalf the respondent as follows, "R does not dispute that C's portfolio was capable of satisfying the CESR requirements".

54.7 The claimant's difficulty, however, is that he would require referees. This is clear from the evidence of Prof McLatchie and, more particularly, from the GMC "Guidance on choosing referees" (701), in which it is stated as follows:

> "Your primary referee should be your current medical director, divisional or clinical director or someone of an equivalent position …. In our experience, your application is unlikely to be successful without a

> structured report from your current clinical or medical director. …. At least two of your [*other*] referees should be doctors in the specialty you are applying in, or a closely-related specialty."

54.8 In light of this guidance, the claimant's primary referee would have been Dr Dwarakanath, Medical Director, or Mr Agarwal, Clinical Director. The two other referees would have to be drawn from the claimant's Upper GI team: Mr Gopinath, Mr Shanmugan or Mr Bhaskar. There were others in that team but the Tribunal accepts that they did not know the claimant or his work to the extent that would have been sufficient for any of them to provide a persuasive reference.

54.9 The claimant's evidence is that this enforced choice of referees effectively precluded him from progressing his CESR application. As Ms Quigley accepted in her written submissions such references are a prerequisite to obtaining the CESR accreditation, "and without the support of his superiors he could not become a substantive consultant."

54.10 In this connection, a starting point is the email the claimant wrote to Mr Agarwal and Ms Dean on 22 May 2017, which is referred to at paragraph 10.32 of the Liability Judgment, including that the claimant had found it unacceptable for "Mr Agarwal to start shouting and projecting insults to myself by making degrading remarks that I perceive myself as a good Surgeon contrary to his belief, that was completely unnecessary". In both that paragraph 10.32 and paragraph 10.33 of the Liability Judgment, the Tribunal also records other relevant matters including the corroborative evidence of Mr Tabaqchali. In those circumstances, the claimant submitted a grievance, which is referred to at paragraph 10.35 of the Liability Judgment; and at paragraph 10.40 the Tribunal recorded that it appeared that Mr Agarwal was aware of the claimant having raised a grievance against him prior to the Morbidity and Mortality ("M&M") meeting on 28 July 2017.

54.11 The Tribunal's findings of fact in regard to that M&M meeting are set out at paragraph 10.38 of the Liability Judgment. Those findings include the following:

54.11.1 The meetings "are mandated by the Royal College of Surgeons and form an essential part of continuing medical education for all concerned".

54.11.2 In front of junior and senior doctors and administrative staff, "Mr Agarwal, first, did accuse the claimant of having no common sense and, secondly, made unfounded allegations against him"; those allegations including that the claimant had not looked after his patient, there was a competency issue, patient safety had been compromised, he had serious doubts about the way the claimant handled things in general and the anaesthetist in charge had been very much concerned about the large quantity of a bile leak during an operation.

54.12 In light of the above, the Tribunal is satisfied that the claimant's contention that he could not trust Mr Agarwal to provide him with a satisfactory reference is well-founded. More than that, at paragraph 10.39 of the Liability Judgment, the Tribunal records the comment made by Mr Tabaqchali during cross examination,

> "that his assessment of the Directorate was that there was "A culture within a culture – a group within a group the members of which got better support, better juniors and better pay". He was asked whether the group to which he had referred were all Indian and he confirmed that they were."

54.13 In this regard Ms Quigley submitted that the claimant was unaware of any conspiracy between members of that group at this time. Whether or not that is correct, the discrimination by Mr Agarwal that occurred at the M&M meeting on 28 July 2017 took place, not in private, but in the presence of other potential referees except Dr Dwarakanath. In such circumstances, the Tribunal finds that it was reasonable and realistic for the claimant to be of the opinion that he would be unable to secure a supportive reference from any of those in that "group", to use Mr Tabaqchali's word: namely, Mr Agarwal, Mr Gopinath, Mr Shanmugan or Mr Bhaskar who had been present at the M&M meeting and whose assessment of the claimant and, therefore, the content of any reference any of them might have provided was likely to be coloured by the criticism of the claimant that they heard directed at him by their Clinical Director, Mr Agarwal. Even if that were not to be the case, the Tribunal finds it was reasonable for the claimant to consider that it would be and that there would, therefore, be implications for any reference he requested from any of them. The Tribunal also considers that it was reasonable and realistic for the claimant not to seek a reference from Dr Dwarakanath who, notwithstanding the fact that he had not been present at the M&M meeting, the Tribunal is satisfied was also a member of that "group".

54.14 Other events occurred in mid-2017, which the Tribunal is satisfied had a bearing on the claimant concluding that he would not be able to secure a supportive reference in connection with his submission to the GMC. Those events include the following:

54.14.1 As is recorded at paragraph 10.41 of the Liability Judgment, the second investigation meeting into the claimant's grievance took place on 4 August 2017 (260). At that meeting the claimant presented to Mr Tulloch details of 25 patients whom he alleged had "suffered complications, negligence, delayed treatment and avoidable deaths" and made express reference to issues of ethnicity and race. Having named five surgeons whom he described as being "untouchable" the claimant is recorded as having said, "it was dependent upon nationality if you are white or from India you would receive different treatment".

54.14.2 As is recorded at paragraph 10.48 of the Liability Judgment, on 27 September 2017 Ms Dean wrote to the claimant to inform him of

> the outcome of the mediation meeting that had taken place on 1 September 2017. That outcome included that the Directorate had concluded that it was unable to support the claimant's request to participate on the 4th tier of the emergency surgical rota.

54.15 The Tribunal notes that within the claimant's portfolio is his Operations Log Book (1207) that concludes with a record of two operations in which the claimant was involved, "Supervising", which took place on 26 September 2017 (2409). In light of the above issues, the Tribunal is satisfied that it is reasonable to infer that these matters between 22 May 2017 and 27 September 2017 were material to the claimant's conclusion that he would not be able to secure a satisfactory reference. This is important as the references are provided on a confidential basis and the Tribunal accepts the claimant's unchallenged evidence that once inferior references came onto his record at the GMC his prospects would be damaged for the foreseeable future.

54.16 Also relevant in this connection is a letter from Dr Al-Asady dated 12 June 2022, which as recorded above was reviewed by Dr Bradbury in the course of producing, in September 2022, her second joint expert psychiatric report in relation to these proceedings (2186). An excerpt from that letter reads as follows:

> "*... he is not able to come to terms with the way he was treated during the course of the employment … disadvantaged and that all his career has been ruined. He could not progress to a position of consultant surgeon, he was in the process of applying through Article 14 to be considered for the Specialist Register in the Summer 2017*."

54.17 To be clear, the discriminatory acts that occurred at this time during 2017 as found by the Tribunal in the Liability Judgment are limited to what took place at the M&M meeting on 28 July 2017. That being so, the Tribunal accepts the submission of Ms Quigley that, in relation to remedy, the claimant cannot go behind the factual finding of the Tribunal in the Liability Judgment but it rejects her submission that it cannot be said that the claimant's "decision not to request references is a consequential act flowing from the acts of discrimination". To the contrary, the Tribunal is satisfied that that decision not to request references from those from whom he was obliged to request them was a consequence that flowed from the discrimination at the M&M meeting on 28 July 2017. Put the other way, the Tribunal finds that the act of discrimination at that meeting was sufficient in itself, albeit that was compounded by nothing being done to correct it.

54.18 Additionally, while the other events up until September 2017, referred to above, were not found by the Tribunal to be discriminatory, in themselves, the Tribunal is now considering those events through a different optic; that being from the perspective of whether the claimant's decision not to seek references from the individuals concerned was reasonable rather than whether those events constituted some form of discrimination. In that regard, the Tribunal is satisfied that the other events provide the context within which the claimant decided that, as a consequence of what occurred at the M&M meeting on 28

July, he could not rely upon his required referees to provide him with sufficiently good references to enable him to succeed with his application for his CESR and thence secure a substantive appointment as a consultant working in the NHS. Additionally, the Tribunal is satisfied that the later of those events will have done nothing to persuade the claimant that when he had initially come to that decision he was wrong.

54.19 For the above reasons, the Tribunal finds that the claimant's decisions that he could not trust those upon whom he was required to rely to provide a satisfactory reference and, therefore, that he could not progress his CESR application for want of such references were reasonable decisions for him to make in the circumstances.

54.20 In light of that finding it is unnecessary for the Tribunal to address in detail two other matters relied upon by the claimant and in Ms Criddle's submissions on his behalf, namely as follows:

54.20.1 The respondent removing the claimant from the on-call rota meant that he could not apply for his CESR as he was unable to provide with his application current evidence of competence including showing evidence of managing "the unselected emergency take" (2121). The Tribunal's findings at paragraph 10.89 of the Liability Judgment are relevant in this connection.

54.20.2 The claimant had been unable to work on the on-call rota since this time because of the serious and precipitate deterioration in his mental health as set out in the joint psychiatric report from Dr Bradbury; particularly in relation to his suspension by Prof M at their meeting on 21 September 2018 (265 and 281) and Dr Bradbury's conclusion that as at the date of her report, "the injury to feelings, hurt, humiliation etc are not reversible"(281).

54.21 Had it been necessary for the Tribunal to consider the above two matters, however, it is satisfied as to each of them, which would have provided alternative bases for the claimant not making his CESR application.

54.22 Absent the discriminatory treatment and the conduct and culture of the group of consultant surgeons within the Directorate from amongst whom the claimant was obliged to select his potential referees, on the evidence before it the Tribunal finds that the claimant would have submitted his CESR application by late 2017 and that he would have been successful in obtaining his CESR by mid-2018. This is borne out by the evidence of Prof McLatchie, which is set out above and bears repeating, that he believed that the claimant had "met all the collegiate criteria in order to obtain the post of substantive consultant" and there was "no professional reason" why the claimant should not have been able to obtain a referee. In short, the Tribunal finds that if there had been no discrimination at the M&M meeting on 28 July 2017, the claimant would have requested the required references and, in all probability, would have obtained CESR accreditation.

54.23 Obtaining the CESR would not, of course, have resulted in the claimant's immediate appointment as a substantive consultant but he would have been eligible to apply for such an appointment. In re-examination the claimant stated that he was aware of at least four substantive Upper GI vacancies in the region during the period September 2018 to September 2022. The Tribunal is not satisfied, however, that in this regard the claimant adduced sufficient evidence on important matters (such as when the posts became available, what the specialties were and whether he would have been eligible to apply) to enable it to assess the likelihood of the claimant being appointed to any of those posts. In short, the Tribunal is not satisfied that at this time the claimant would have secured employment as a consultant at another Trust in the region.

54.24 More particularly, however, the respondent itself had relevant vacancies for substantive consultants. The first arose in the Summer of 2019 in respect of the substantive consultant position formerly held by Mr Shanmugan for which Mrs Morrell confirmed in her witness statement the claimant would have been able to apply "if he had been on the specialist register". There had only been one candidate for that vacancy and, as Mrs Morrell confirmed in cross examination, if there had only been two candidates she would have expected the claimant to have had a good chance of being appointed. In the event, the vacancy having been offered to the only candidate, he had turned it down. Mrs Morrell further confirmed in cross examination that in those circumstances, if the claimant had not been successful in competition with the other candidate, she would have expected him to have been offered the position when that other candidate withdrew provided he had been regarded as appointable which, on the basis of Prof McLatchie's assessment, the Tribunal is satisfied he would have been. Instead, this post was re-advertised and Mr PG was appointed albeit as a locum as he is currently following the CESR route to obtain his specialist GMC registration at which point he will become eligible to apply for the position on a permanent basis. On a point of detail in this regard, on balance of probabilities, the Tribunal finds that the claimant would have been appointed to this post not on the date that Mr PG was appointed in January 2020 but on the date that the vacancy was initially offered to the first candidate only to be rejected by him. In the absence of any clear evidence on the point, the Tribunal accepts the claimant's contention that this would have been 1 September 2019. In making this finding, the Tribunal has noted from paragraph 30 of Mrs Morrell's witness statement that Mr PG was interviewed on 16 December 2019 and, importantly, that "the post became vacant on 1 January 2020 when Mr Shanmugan retired from the Trust". On the evidence before it, however, the Tribunal is satisfied that the claimant would nevertheless have been appointed as a consultant surgeon on 1 September 2019, if necessary on a supernumerary basis, especially as he was already an employee of the respondent working in the Directorate.

54.25 The second potentially suitable vacancy was for an Upper GI substantive consultant that was filled by Mr S in September 2022 for which the Tribunal is satisfied the claimant could have applied because he had both experience and training in bariatrics. Given that this was Mr S's first consultant post, on balance of probabilities, the Tribunal accepts the submission of Ms Criddle that Mr S would not have been appointed in preference to the claimant.

54.26 An issue that the Tribunal considers to be of importance but is not included in the parties' agreed list of issues is the basic salary grade upon which the claimant would have been appointed as a substantive consultant in September 2019. In his schedule of loss, the claimant contends that he would have been appointed on the national terms and conditions, pay scale code YC72 scale point 10 (Threshold 6 – T6) if appointed in September 2018 and scale point 11 if appointed in September 2019 (873). In light of the Tribunal's finding that he would have been appointed to a post of substantive consultant on 1 September 2019, it is the latter scale point 11 that is relevant. The Tribunal accepts the claimant's contention that he would have been appointed at that scale point 11. That appears to have been broadly the approach that the respondent took in relation to the settlement that is recorded in the COT3 (2360); namely that in accordance with paragraphs 12 and 5 of Schedule 14 to the national terms and conditions (451), recognising the "approved consultant-level experience that the consultant has gained", the claimant's experience as associate specialist was taken as "consultant-level experience".

54.27 In this connection, the Tribunal notes that in the pay and conditions circular (M&D) 1/2017 of 22 March 2018 (861) the salary amounts of scale points 9 to 13 are the same at £92,078 (873) and the Tribunal considers that that amount should be the relevant salary to be taken as a starting point in calculating the amount of compensation to be awarded to the claimant in respect of 'lost' PAs, to use the term used in the claimant schedule of loss. That said, the Tribunal also notes that as at 1 September 2019 point 11 under Circular 2/2019 was £95,795 and the parties will need to take this and subsequent relevant increases into account in making their calculations.

54.28 In coming to this finding, the Tribunal has not ignored the fairly persuasive evidence of Mrs Morrell that, in her opinion, the claimant would have been appointed on a lower point than scale point 10. She explained that her approach would have been to take, as a starting point, the claimant's salary of £82,224 as an associate specialist, then apply paragraph 12 of Schedule 14 referred to above, which would have resulted in appointment at scale point 03 but then, in accordance with paragraph 5 of that Schedule, award two points to reflect the claimant's consultant-level experience; that producing a salary at scale point 05 of £86,369, which would then be subject to annual progression thereafter. The Tribunal accepts that that might have been the general approach in respect of a new appointment of a consultant in factual circumstances similar to those in this case but it is satisfied that there are particular circumstances in this case such that that general approach would not have applied. Those circumstances include the evidence of both Mrs Brown and the claimant regarding the difficulties of recruitment to clinical roles within the respondent, which is also borne out more specifically by Mrs Morrell's evidence that, in relation to the substantive consultant position formerly held by Mr Shanmugan, her understanding was that there was only one applicant who, having been offered the position then withdrew and did not take up employment; this leading to a decision to re-advertise the post on a locum basis. In this connection, the Tribunal has also brought into account the submissions by Ms Criddle in which she pointed, first, to the claimant's prior experience both as an associate specialist and as a locum consultant for 2½ years and, secondly, to

what the respondent did in settling his further claim referred to above when he was put on scale point 13 in recognition of his 13 years' experience with a consequent increase in salary from 1 October 2022 when he attained 14 years' experience.

54.29 In all the circumstances, on balance of probabilities, the Tribunal prefers the approach contended for by the claimant that in this particular case, he would have been appointed on 1 September 2019 on scale point 11.

54.30 This finding is significant as it establishes the foundation upon which can be built what might be referred to as the "recreated scenario" of the claimant's career with the respondent from 1 September 2019 onwards. More particularly, the Tribunal is satisfied that, upon the claimant's appointment as a substantive consultant, this being a new appointment to a senior post, negotiations would have ensued between the parties the outcome of which would have produced an agreed job plan within which would have been addressed such matters as the allocation to the claimant of additional PAs and the claimant's on-call commitment. It follows, that in this recreated scenario with an agreed job plan in place, many of the events that occurred as detailed in the Liability Judgment would not have occurred; examples would include the entire disciplinary process that was commenced again the claimant and much of the job plan process including the job plan appeal.

54.31 The Tribunal now progresses from this essential finding to consider the losses the claimant has suffered as a consequence of the discrimination to which he was subjected. Those he contends for are addressed below.

Additional PAs

54.32 In this regard, Ms Criddle submitted that the claimant would have undertaken 15 PAs in total. In this she relied upon the fact that the job plans of other substantive consultants showed them doing well in excess of 10 PAs each week, and submitted that the claimant would have done a number of PAs at the upper end of the range. Further, that those PAs would have been inclusive of an on-call commitment, it being a requirement for all the respondent's consultants to be on the on-call rota. This, she submitted, would have led to the claimant being paid for an additional 3.5 PAs per week (each being at 10% of his basic salary) and receiving an availability supplement of at least 5% on his basic salary.

54.33 The Tribunal does not accept that submission in its entirety. It accepts that the PAs of the other consultants are as set out in the representatives' submissions and are to be found in their respective job plans: Mr Agarwal – 14.728 (1758); Mr Gopinath – 13.577 (1837) Mr R – 13.933 (1896); Mr TG – 14.237 (1950) Mr PG – 12.603 (2034). In this respect the Tribunal notes, first, that all those PAs, including those of Mr PG, are said to be "Core" PAs and, secondly, that various dates are given for the respective job plans. In respect of that second point, the Tribunal accepts the evidence of Mrs Morrell that job plans are not always updated but nevertheless provide a reasonable comparison at the time in question: i.e 1 September 2019.

54.34 As set out above, the Tribunal is satisfied that, upon the claimant's appointment as a substantive consultant, negotiations would have taken place between the parties one outcome of which would have been agreement as to the claimant's additional PAs. In light of the figures of the other consultants referred to above, on balance of probabilities, the Tribunal finds that the outcome of such negotiations would have seen the claimant being allocated two additional PAs, which when added to his existing 11.5 PAs, would have produced a total of 13.5 PAs; each of which being paid at 10% of the claimant's basic salary. As submitted by Ms Criddle, this would have been inclusive of the claimant's on-call commitment, which the Tribunal is satisfied the claimant would have undertaken.

54.35 Furthermore, noting the claim forms that the claimant has completed in the past (for example 1407) in which he has always ticked the mid-range "Normal On-call Frequency" of "1:5 to 1:8", the Tribunal finds that this would have resulted in the claimant's PAs being reduced from 15.5 to 13.5. The Tribunal has recorded above its approach that it will limit its Judgment to the principles in issue rather than making the detailed calculations. While not reneguing from that approach, it records that it would seem sensible to the Tribunal if the parties were now to negotiate a Job Plan based upon the claimant undertaking 13.5 PAs per week, thereby safeguarding the continuation of these additional payments in the future. The Tribunal further considers that the determination of those 13.5 PAs should reflect the fact that the claimant's current abilities are significantly limited by his ill-health and, therefore, it would be appropriate if regard were to be had to the claimant always having had an interest in such matters as training and mentoring, and representing the Directorate and/or the respondent on outside bodies.

54.36 The Tribunal notes, however, that the claimant retained his 15.5 PAs until 1 July 2020. That being so, the payments the claimant actually received in respect of PAs above 13.5 from 1 September 2019 until 1 July 2020, when the claimant was taken off the rota, will need to be brought into account in the calculations the parties are to undertake.

54.37 As also referred to above, the Tribunal is satisfied that a further outcome of the negotiations between the parties upon the claimant being appointed to a post of substantive consultant would have been the production of an agreed job plan. That job plan would have addressed the additional PAs as considered above and would also have addressed the claimant's on-call commitment, which is linked to the additional PAs. It bears repeating that the Tribunal finds that with such an agreed job plan in place, much of what actually occurred in this case would not, in fact have occurred. In this regard, one of the examples given above is that the job plan appeal that took place on 5 October 2018 would not have taken place. That being so, the Tribunal need not address the submission of Ms Quigley (in respect of which she relied upon paragraph 19(r) of the Liability Judgment) that "the job plan appeal which made the decision to permanently remove C from the rota is a *novus actus interveniens* and breaks the chain of causation."

Additional locum consultant work

54.38 The parties were agreed that if the claimant had been appointed to the role of substantive consultant, in addition to undertaking work in respect of the PAs agreed between the respondent and the claimant, he would have worked a number of sessions/shifts as locum consultant. Two principal issues arise in this respect: first, how many locum consultant sessions the claimant would have worked; secondly, how much he would have been paid in respect of each session worked. The Tribunal has limited evidence on which to make its findings in relation to these issues.

54.39 Considering the first of the above issues, the claimant has estimated that he would have undertaken 20 sessions every six months, which is disputed by the respondent. The parties were agreed that there were 111 locum consultant sessions available during a 27-month period from 15 June 2020 to 14 October 2022 and that that represents an average of 4.11 shifts per month for all consultants; albeit some consultants do no locum work. The Tribunal accepts that the claimant remained eligible for consultant locum work at this time. An analysis of the claimant's timesheets produced by the respondent (1487), shows that in the period covered by that analysis the claimant undertook 1.28 consultant locum sessions each month.

54.40 In the Tribunal's recreated scenario of the claimant being appointed as a substantive consultant on 1 September 2019 and a negotiated job plan having been agreed, and accepting (as does the respondent) his work ethic, the Tribunal finds that the claimant's commitment to undertaking 1.28 consultant locum sessions per month is unlikely to have decreased but no evidence has been provided to the Tribunal to support a proposition that such number would have increased either.

54.41 As such, the Tribunal finds that the claimant would have worked 15 additional consultant locum sessions each year.

54.42 The second of the above issues is how much the claimant would have been paid in which respect there is a significant conflict of evidence between the parties. The claimant contends that he would have been remunerated in respect of each session worked at a rate of £500, which is again disputed by the respondent. The Tribunal rejects the claimant's contention as to that rate of pay as it is not borne out by the evidence, which includes several claim forms completed by the claimant himself in which he has entered "locum consultant" in the section "Grade" and has then entered the number of PAs he had worked on various dates and the total PAs claimed on that particular claim form. Taking some of those forms at random, the claimant claimed as follows:

Month	PAs claimed per session	Total PAs claimed
Four dates in July 2016 (1410)	2.5 2.5 2.5 1.5	9

Three dates in August 2016 (1415)	1.5 1.5 1.5	4.5
Two dates in November 2016 (1429)	1.5 1.5	3
Four dates in December 2016 (1437)	2.5 2.5 2.5 1.5	9

54.43 The Tribunal is satisfied that if, as the claimant contends, locum consultants were to be paid a flat rate of £500 per session, the claimant would not have needed to submit claim forms in this amount of detail; rather, it would have been a simple case of the claimant merely recording the date(s) upon which he undertook a session as locum consultant whereupon he could have expected to receive the £500 flat rate of pay.

54.44 In this connection, the Tribunal prefers the clear evidence provided by Mrs Morrell that although there is an agreed rate of pay of £500 for additional work, that is in respect of a "special event" as shown in the local agreement headed "Agreement for Rates of Pay for additional work Consultants and SAS grade doctors" (2366); such special event pay being typically applicable to waiting-list initiatives. Additionally, that that rate applies to a four-hour period and can be increased or reduced depending on whether the activity is longer or shorter than four hours. Thus it is the exception to the rule rather than the 'going rate'. That it is the exception is reflected in the fact that the claim form was amended in 2016 to add that the exceptional rate of £500 requires the signature of the "Medical director only" by way of authorisation.

54.45 In this connection also, the Tribunal rejects the claimant's oral evidence that from its inception that agreement was laughed at by the consultants and was "dead in the water". On the contrary, the Tribunal prefers the evidence of Mrs Morrell in cross examination that the agreement came into force on and had been implemented since its due date, had been refreshed thereafter in 2016 and is still applicable; further, the guidance that she had been requested to produce in this regard at that time was reviewed and refreshed in 2020 and is next due for review on 16 December 2023.

54.46 In the above context, the Tribunal also accepts Mrs Morrell's evidence as to the calculation of the correct rate of pay for each routine session (i.e. not an exceptional special event) worked as a locum consultant. That is to work on the basis of the consultant's normal contracted whole-time salary, as documented in the local agreement (2367), which is then divided by 52.1429 weeks and then further divided by 10 PAs (the whole time contract) to give the standard PA rate. Worked examples of this calculation are to be found in a hand written note at the foot of the claimant's claim forms date stamped as having been received on 3 January 2017 (1437) and 2 February 2017 (1444), both of which show the PA rate of £163.9996 based upon the claimant's locum consultant salary at the time of £85,514. In contrast, the claimant's claim form date stamped as having been received 3 January 2017 in relation to his grade

of associate specialist has a handwritten note showing a figure of £156.127, which is the product of the same calculation of basic salary divided by 52.1429, divided by 10 but is based on the claimant's associate specialist salary at that time of £81,409.

54.47 There are other claim forms in the agreed bundle of documents upon which the claimant's claim for a particular number PAs has been overwritten by someone inserting a flat hourly rate of pay. In his claim form date stamped as having been received on 25 April 2017 (1459), for example, someone has written £38 per hour. The Tribunal finds that troublesome and, as Mrs Morrell fairly accepted, it is inconsistent with the document headed "Agreement for Rates of Pay for additional work Consultants and SAS grade doctors" (2366). In cross examination, Mrs Morrell did, however, offer an explanation that the manuscript note that had been affixed to that particular claim form, "Should be hourly rate as he volunteered £38", might indicate that if someone such as the claimant had been covering a lower role of a junior doctor he would be paid accordingly and receive the lower rate of that junior doctor; and that the junior doctors are not covered by the agreement. Similarly, in the claim form date stamped as having been received on 12 November 2018 (1473) the claimant has himself written £57 per hour rather than inserting a number of PAs. Again Mrs Morrell suggested that this locum work would be on the middle grade rota and the claimant would accordingly be paid the hourly rate for a resident medical officer, which is also not covered in the agreement; she assumed £57 was the hourly rate in question at North Tees, which compared with the £38 hourly rate at Hartlepool.

54.48 Having considered all of the evidence before it, on balance of probabilities, the Tribunal finds that the rate payable in respect of additional locum consultant sessions would be that calculated in accordance with the above agreement (2366) and would be based on the actual salary of the relevant consultant subject to the formula calculation referred to above. On the evidence available to the Tribunal it considers that it would be pure speculation if it were to make any finding as to how many of these sessions, if any, would have come within the exceptional rate (i.e. a special event) although it would seem probable that at least some would have been so categorised.

54.49 As explained earlier, it is for the parties to undertake the necessary calculations but the Tribunal considers that it is likely that the analysis of the claimant's timesheets produced by the respondent that is referred to above (1487) will be linked to payroll data, which (if it is) the Tribunal suggests could be used for this purpose.

Private work

54.50 The claimant contends that had he been a substantive consultant he would have undertaken work with a private healthcare provider and in his schedule of loss he has made a claim based on undertaking one private session each week on NHS patients only at the rate of £750 per session.

54.51 The Tribunal has been provided with no 'hard' data in this respect: for example, as to the extent of private work that might be available in the region and the level of remuneration that would be paid.

54.52 That said, the Tribunal has already accepted above that the claimant would have sought and been allocated two additional PAs equating to 8 hours' work and, therefore, a 20% increase on his basic 40 hours of work each week.

54.53 Further, on the basis of the agreed 111 locum consultant sessions referred to above, the Tribunal has found that the claimant's commitment to undertaking 1.28 consultant locum sessions per month or approximately 15 sessions per year would have continued.

54.54 In this respect, the findings of the Tribunal thus far have included the following:

54.54.1 The claimant would have worked 11.5 PAs as a 'base point', each of which amounting to 4 hours' work and, therefore, 46 hours' work each week.

54.54.2 The claimant would have been allocated two additional PAs amounting to 8 hours' work each week.

54.54.3 The claimant would have worked 15 consultant locum sessions annually, amounting to 180 hours each year which, when averaged over the 45 available working weeks produces 4 hours' work each week.

54.54.4 The total of the above elements (46 + 8 + 4) would have resulted in the claimant working 58 hours' each week.

54.55 Bringing into account these additional hours of work and the resultant 58-hour working week, the Tribunal finds on balance of probabilities that, realistically, the consequence would be that the claimant would not be available for and would not undertake any private work.

54.56 Two further additional points are relevant in this regard. First, the claimant has produced three schedules of loss in connection with these proceedings. The first is dated 19 August 2021 but it is only in the third and final schedule dated 24 October 2022 that any mention is made of loss in respect of private work. Secondly, in cross examination regarding the amount of work he undertook in his department compared with others, the claimant answered, "I commit myself to the Trust", adding that he worked many hours more than either Mr Agarwal or Mr Gopinath. On the basis of that answer, which is borne out by other similar evidence from the claimant and the data that is before the Tribunal, it is satisfied that the claimant would have continued with that mind-set and approach and would not have undertaken any private work elsewhere.

54.57 In summary of this issue, bringing into account the above calculation of the claimant working 58 hours each week and his answer regarding his

commitment to the Trust, the Tribunal finds that the claimant would not have undertaken any private work elsewhere.

Application of the facts and the law to determine the issues of principle in relation to remedy

55. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment as to the issues of principle in relation to remedy having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law including those to which it was referred by the representatives.

56. The Tribunal adopts as structure for these decisions the structure of the claimant's schedule of loss dated 24 October 2022 (2307).

Past financial loss

Pay

56.1 The Tribunal is satisfied that the period to which regard should be had in respect of past financial losses is from 21 September 2018, when the claimant was removed from the emergency on-call rota, until 31 August 2019 given that, as described above, the Tribunal has created the alternative scenario of the claimant being appointed as a substantive consultant on 1 September 2019.

56.2 In this respect, the parties essentially agreed the figures in the claimant's schedule of loss: i.e. that he received £228,064.12 for additional work between January 2016 and January 2019, which is a monthly average of £6,163.89; a weekly average of £1,425.40. Further, that in the period 21 September 2018 to 20 August 2019, that represented £65,568.40 (2309); albeit it remained in dispute whether the calculation should be made by reference to 46 or 52 weeks.

56.3 Although focusing on issues of principle rather than making calculations, on the evidence available to it, the Tribunal suggests that the parties should consider the above approach but, in so far as the above period ends on 20 August rather than 31 August 2019, it should be up-rated by some 10 days to cover the period 21 August to 31 August 2019.

56.4 As recorded above, however, as a consequence of the COT3, the claimant was afforded permanent locum status from 20 September 2018 and his salary and pension were adjusted accordingly with back pay to that date (2361). In short, the claimant has not now suffered any past financial losses in respect of that period from 20 September 2018.

Medical expenses

56.5 The Tribunal accepts the claimant's explanation as to why he sought assistance from a consultant psychiatrist privately (which is also alluded to in Dr Bradbury's report) and the fees he has paid as shown in his schedule of loss totalling £865 (2317).

Future losses

Pay

56.6 In this respect the claimant has contended that he continues to suffer loss of earning in respect of the following, which he further contends will accrue until his intended retirement at age 70.

56.6.1 Loss of additional PAs, including loss of on-call PAs.

56.6.2 Loss of additional locum work.

56.6.3 Loss of private work.

56.7 The Tribunal has already addressed each of these points above. In summary:

56.7.1 The claimant will undertake 13.5 PAs: i.e 11.5 plus 2 additional PAs as described at paragraph 54.34 above.

56.7.2 He will undertake 15 consultant locum sessions per annum.

56.7.3 He will not undertake private work.

56.7.4 He will retire at age 67.

56.8 The Tribunal accepts Ms Criddle's submissions that the claimant cannot mitigate these losses for the following reasons:

56.8.1 He is medically unable to work additional hours, whether by way of additional PAs in his existing job or by way of locum additional work.

56.8.2 He cannot apply for his CESR and substantive employment because of his health and therefore he cannot work in the private sector.

56.8.3 He cannot seek alternative employment which would put him in any better position than he is in with the respondent given the ongoing limitations on his ability to work

56.9 The Tribunal accepts that in making the calculations the parties will have to consider the question of discounts for accelerated receipt as shown in the claimant's schedule of loss.

Medical expenses

56.10 The Tribunal again accepts the claimant's explanation as to why he will continue to seek assistance from a consultant psychiatrist privately with a minimum of biannual appointments for the foreseeable future at fees estimated at £490 to £735 per annum (2320).

Injury to feelings

General considerations

56.11 In the decision of the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102 CA, the concept of injury to feelings was summarised as follows:

> "An injury to feelings award encompasses subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression."

56.12 In light of the above that Tribunal first sets out some basic legal concepts and principles many of which it draws from the guidance given in the decisions in Ministry of Defence v Cannock [1994] IRLR 509 and Prison Service v Johnson [1997] IRLR 162.

56.13 Compensation for injury to feelings is to be assessed on a tortious basis, the aim being to put the claimant in the position he would have been in but for the discrimination. The compensation must seek to compensate for injury to feelings, not punish the discriminator, the focus being on the injury the claimant has suffered as a result of the unlawful acts. When making awards for injury to feelings, a tribunal should bear in mind the general level of damages awarded in personal injury cases in which respect Ms Quigley has provided what she refers to in her written submissions as being "Quantum Comparator cases" to which the Tribunal has had regard. Once liability is established a tribunal need only be satisfied that it caused the loss or damage claimed; does it in fact naturally flow from the discriminatory act that has been made out? – Essa v Laing [2004] IRLR 313 CA. It is usually inappropriate to compensate for each individual discriminatory act that has caused a state of injury; rather, a global approach should normally be adopted ICTS (UK) Ltd v Tchoula [2000] IRLR 643.

56.14 Injury to feelings is not limited to aspects of working life and in this case there is evidence of the effects on the claimant's personal life. A loss of positive feelings in the workplace, including relationships with colleagues, are also important factors. The Tribunal considers that to be relevant in this case where it is clear from the evidence that the claimant has lost positive aspects of his work and career that were present before the discrimination. Other important factors include the duration of the claimant's exposure to discriminatory treatment which is referred to in the Liability Judgment, the duration of its consequences, the effects on his health, the need for psychiatric intervention and what appear to be his poor prospects of a future 'recovery'.

56.15 The claimant's claim form was presented to the Tribunal in on 16 July 2019. At that time, the bands of compensation for injury to feelings that were referred to in Vento, as updated, were as follows:

56.15.1 Lower band: £900 – £8,800.

56.15.2 Middle band: £8800 – £26,300.

56.15.3 Top band: £26,300 – £44,000 (albeit that could be exceeded in the most exceptional case).

56.16 The Tribunal reminds itself, however, that these are not rigid rules and, as was said in the decision in Base Childrenswear Ltd v Otshudi UKEAT/0267/18/JOJ, the guidance in Vento should not be read "as placing a straight jacket on the ET".

The award in this case

56.17 As is recorded above, the representatives were agreed that the acts of direct race discrimination, racial harassment and detriments for making protected disclosures that had been held by this Tribunal to be well-founded were the ten acts that each of them had listed in their respective written submissions; albeit during the hearing agreeing that there had been nine separate acts. At the time of the Liability Judgment the Tribunal considered them to be extremely serious matters and continues to be so satisfied. More importantly in considering an award for injury to feelings, the Tribunal has accepted above the serious impact of the discrimination on the claimant's mental health and his domestic and working life in respect of which, for example, the unwarranted and long drawn-out disciplinary process and the attitude of the claimant's colleagues in the Directorate towards him caused him significant stress and anxiety. More than that, the effects of the discriminatory treatment have had a devastating effect on the claimant's physical and mental health and have effectively put an end to his chosen career. In this regard, Dr Bradbury stated that the claimant's "personal and emotional losses are enormous".

56.18 The evidence of this in the two reports from Dr Bradbury is clear. The Tribunal has set out above the claimant's symptoms that she identified including pervasive low mood, sleep disturbance, nightmares, low energy and motivation, self-neglect, a sense of loss, hopelessness and suicidal ideation. She also identified the significant impacts of the discrimination upon the claimant's chosen career in that he is now only able to undertake routine non-emergency surgery and does not feel confident to do emergency surgery that requires decision-making under pressure and working unsociable and long hours often through the night. Further, she considered that the claimant will be disadvantaged on the open labour market when attending interviews due to a lack of confidence and self-belief arising from depression. A key section in Dr Bradbury's first report has already been set out above but it bears repeating in the context of a consideration of injury to feelings:

> "whereas in September 2018 Mr Kassem suffered an understandable although extreme reaction to the outcome of that meeting, at that time, *had the decision been reversed* then his injury feeling would have recovered. At this point in time, the injury to feelings, hurt, humiliation etc *are not reversible*. Indeed, for the reasons outlined above, his depressive

> episode has become more severe." [*Once more the emphasis in this excerpt has been added by the Tribunal.*]

56.19 The acts of discrimination agreed between the parties that are referred to above actually constitute eight incidents of race discrimination and seven incidents of detrimental treatment arising from having made protected disclosures. Ms Criddle submitted that the Tribunal should make an award for injury to feelings both in respect of race discrimination and harassment and in respect of protected disclosure detriments; and they should both be within the top Vento band.

56.20 The Tribunal is satisfied, however, that to make the two awards as she submitted would go against the fundamental premise that compensation is for the injury caused and not for the manner of discrimination. In this connection, the Tribunal had regard to the decision in Khanum v IBC Vehicles Ltd [2011] 2 AC 229 in which the EAT rejected an argument by the claimant for separate awards of injury to feelings for each cause of action engaged and stated as follows:

> "We do not accept that the tribunal should have considered the causes of actions separately. …. the causes of actions essentially relate to the same factual complaints and the tribunal were entitled consider the issue of compensation as a global figure."

56.21 Thus the Tribunal is satisfied that to make an award by reference to the separate heads of race discrimination and detriment would fall into the trap of compensating the claimant by reference to the conduct of the perpetrators rather than by reference to the injury to feelings that he has suffered, and would also risk introducing 'double-counting': see Vento and Essa.

56.22 Focusing as it must on the extent of the injury to the claimant's feelings, the Tribunal is satisfied that this is an exceptional case in respect of which, as indicated above, an award in excess of the top band of Vento is permissible. Considering the totality of the awards in this case, however, and the risk of overlap between them the Tribunal has held back from that and has limited its assessment of this award for injury to feelings to the then maximum of £44,000. In this regard, the Tribunal has noted the decision of the employment tribunal in Michalak v Mid-Yorkshire Hospitals NHS Trust (Case numbers 1808465/07, 1808887/08, 1810815/08 relied upon by Ms Criddle, the facts of which contain clear parallels with this case.

Aggravated damages

56.23 In the above context, the Tribunal addresses the head of aggravated damages contended for by the claimant. It is important to note, however, that this is not actually an additional head of damage in that aggravated damages are, in fact, an aspect of injury to feelings and, therefore, the focus must again be on the substance of the injury notwithstanding that it is the manner of an employer's conduct that engages the jurisdiction to make an award of aggravated damages. In this connection the Tribunal paid careful attention to

the decision of the EAT Commissioner of Police of the Metropolis v Shaw UKEAT 0125/11/ZT. It again sets out some initial general considerations.

56.24 In this regard the Tribunal considers that the principal aggravating features in the incidents of discrimination as found in the Liability Judgment are, first, the letter Dr Dwarakaranth wrote to the claimant on 7 March 2019 informing him that he would be the chair of the disciplinary hearing panel and, secondly, the unwarranted significant delay of 74 weeks in the conduct of the disciplinary investigation, none of the allegations in which were ultimately upheld. Those two matters could be separated out and considered in the context of aggravated damages but, while those factors have certainly not been ignored, the Tribunal has instead included them and, therefore, what might have been an award of aggravated damages in those respects in the overall assessment of an award for injury to feelings referred to above.

56.25 There remains, however, the matters that occurred after the promulgation of the Liability Judgment, which the Tribunal has set out above under the heading, "Events after the Liability Judgment". In that section of these Reasons the Tribunal has recorded its concerns in relation to the letters sent by the respondent to the claimant and to Ms Dean and Mr Agarwal in which respect it broadly accepts Ms Criddle's written submissions. The Tribunal accepts, however, the submission by Ms Quigley that, pursuant to the COT3, the respondent has already compensated the claimant for the injury to his feelings that have arisen from acts and omissions after the date of the Liability Judgment. In these circumstances, the focus of the Tribunal has to be only upon the agreed discriminatory acts as found by the Tribunal in the Liability Judgment and the injury to feelings arising therefrom.

56.26 In summary of the two immediately preceding paragraphs, therefore, compensation for the principal aggravating features as found in the Liability Judgment has been included in the Tribunal's assessment of injury to feelings while compensation for matters occurring after the Liability Judgment has been addressed in the COT3. In short, the Tribunal does not make any award in respect of aggravated damages.

Personal injury

56.27 Since the decision of the Court of Appeal in Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481 it has been acknowledged that employment tribunals have jurisdiction to award damages for personal injuries caused by discrimination. Thus, unlike aggravated damages, personal psychiatric injury is a separate head of damage albeit it comes with substantial overlap with injuries that are compensated for in an award of injury to feelings. The Tribunal is therefore alert to the potential for overlap or double recovery.

56.28 Ms Criddle submitted that an award in the regional £40,000-£45,000 was appropriate and in this regard relied upon the above decision in Michalak, the facts of which the Tribunal repeats have similarities with the facts of this case and, importantly in this context, the effects of the discrimination upon the claimant. In her submissions Ms Quigley acknowledged, "in light of the findings

of the Bradbury report, the Respondent accepts that the claimant's injuries fall within the Moderately Severe Bracket": i.e £19,070 to £54,830. Ms Quigley then submitted that "the appropriate level of personal injury and injury to feelings arising from the acts of discrimination is the global figure of £50,000" but the Tribunal considers that that is to conflate the separate heads of damage of personal injury and injury to feelings.

56.29 Both representatives referred the Tribunal to the Judicial College guidelines, the 15th Edition of which is relevant in this case. The Tribunal has had regard to those guidelines and, in particular, that when valuing claims of psychiatric injury the following factors that are of relevance in this case need to be taken into account:

56.29.1 the injured person's ability to cope with life and work;

56.29.2 the effect on the injured person's relationships with family, friends and those with whom he comes into contact;

56.29.3 the extent to which treatment would be successful;

56.29.4 future vulnerability;

56.29.5 prognosis;

56.29.6 whether medical help has been sought.

56.30 For purposes of comparison, both representatives referred to previously decided cases and the Tribunal accepts that it is possible to draw some guidance from awards made in such cases. As such, the Tribunal has had regard to the cases relied upon by the representatives but has done so with some caution as no two cases are the same: see, for example, the observations of Langstaff P in HM Land Registry v McGlue UKEAT/0435/11/RN.

56.31 Having regard to the above factors and the submissions of the representatives, the Tribunal is satisfied that an appropriate award in respect of psychiatric damage caused to the claimant would be not less than £45,000.

Interest

56.32 In light of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, as amended, the Tribunal has decided that it would be appropriate in this case to exercise its discretion "to include interest on the sums awarded".

56.33 The parties are agreed that the calculation of interest will be in accordance with those Regulations and that the rate of interest is presently set at 8%.

ACAS uplift

56.34 As set out above, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the Tribunal may increase any award it makes to the claimant by up to 25% if a relevant Code of Practice applies and the respondent has unreasonably failed to comply with that Code. In this connection, the Tribunal reminds itself that to award a percentage uplift has both compensatory and punitive elements: see Secretary of State for Justice v Plaistow [2021] UKEAT/0016/20 and Slade v Biggs [2021] EA-2019-00687-VP.
56.35 The Tribunal has considered the above provision in light of the guidance given in the decision in Rentplus UK Limited v Coulson EA-2020-000809-LA, in which other relevant decided cases are considered. The Tribunal addresses the four questions identified in that decision as follows:

56.36 *Does the code apply?* The proceedings in this case concerned matters to which the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code") applies in two respects: first, it applies with regard to the disciplinary investigation that was undertaken in relation to the claimant; secondly, it applies with regard to the grievances that the claimant raised with the respondent.

56.37 *Has there been a failure to comply with the Code?* In the Liability Judgment the Tribunal has identified the several failures on behalf of the respondent to comply with the Code as follows:

56.37.1 As recorded at paragraph 10.134 of the Liability Judgment, Dr Dwarakanath appointing himself as chair of the disciplinary hearing panel; he not being impartial as it was he who had initiated the disciplinary investigation against the claimant.

56.37.2 Contrary to several provisions in the Code that emphasise the need to proceed "without unreasonable delay" (and, incidentally, contrary also to the advice of occupational health on 4 November 2019, which is referred to above and in the Liability Judgment), drawing out the disciplinary investigation for a period of 74 weeks; this delay being referred to in several paragraphs of the Liability Judgment.

56.37.3 As recorded at paragraph 10.57 of the Liability Judgment, the inordinate delay of over six months, contrary to paragraph 33 of the Code, in the conduct of the claimant's first grievance.

56.37.4 Contrary to paragraph 40 of the Code, failing to implement the recommendations arising from that first grievance of the claimant as is recorded at paragraph 10.43 of the Liability Judgment.

56.37.5 Contrary to the clear inference to be drawn from paragraphs 42 and 43 of the Code, conducting the appeal hearing in respect of that first grievance in the absence of the claimant. In this respect it is apparent from the Tribunal's findings at paragraph 10.59 of the

Liability Judgment that there was nothing to suggest that the claimant refused to attend the hearing but only that, the hearing having been fixed for a date that the claimant had previously said was not suitable for him, (to quote from paragraph 10.58 of the Liability Judgment) "he had a theatre list that day, he was busy on-call the week before and it was very short notice and he needed time to prepare".

56.37.6 Paragraph 34 of the Code provides that an employee "should be allowed to explain their grievance" in relation to which the claimant reasonably requested that information should be sought from Mr CH and Mr Tabaqchali at the adjourned appeal hearing. In this respect, it is recorded at paragraph 10.62 of the Liability Judgment that "it appears that the two surgeons could potentially have given pertinent evidence in that regard yet Ms Thompson refused to invite them to do so" and did not even "reply to the three letters from the claimant".

56.37.7 As is recorded at paragraph 10.71 of the Liability Judgment, "in oral evidence, Dr Dwarakanath stated that he did not accept that finding of the Grievance investigation". In this respect, the Tribunal considered whether that refusal was a personal refusal on the part of Dr Dwarakanath as opposed to a refusal by the respondent but, given his position at the time of Medical Director and Deputy Chief Executive, it is satisfied that that is not a distinction that should be drawn and that the refusal by Dr Dwarakanath equates to a refusal on behalf of the respondent.

56.37.8 There was further inordinate delay in the conduct of the second grievance (see paragraphs 10.146 and 10.147 of the Liability Judgment) in respect of which paragraph 33 of the Code is again relevant.

56.37.9 As is referred to in paragraph 10.153 of the Liability Judgment, contrary to paragraph 33 of the Code, Mr Sheppard on behalf of the respondent did not consider the claimant's grievance letter of 29 May 2019.

56.38 Although each of the above failures to comply with the Code has been set out for completeness, in its consideration of whether to award an uplift in accordance with section 207A, the Tribunal has discounted those referred to in the first two of the above sub-paragraphs. The reason for that being that it has brought those two failures into account in its consideration of aggravated damages/injury to feelings referred to above and to include them again in connection with these considerations of whether to apply an uplift would inevitably lead to some double recovery.

56.39 Applying the approach in Lawless v Print Plus (Debarred) UKEAT/0333/09/JOJ, the Tribunal is satisfied as follows:

56.39.1 the provisions in the Code were not applied as they should have been;

56.39.2 the failures to comply were deliberate rather than inadvertent; and

56.39.3 there are no circumstances that might mitigate the blameworthiness of the failures.

56.40 *Was the failure to comply with the Code unreasonable?* In this regard, on the evidence before it and in light of its findings as recorded in the Liability Judgment, the Tribunal has failed to identify anything to support a contention that the failures on the part of the respondent were reasonable; not that Ms Quigley made such a contention and simply submitted that the respondent's primary case was that no uplift was applicable but, in the alternative, it should be limited to 10%.

56.41 *Is it just and equitable to award an uplift and, if so, by what percentage?* In this regard, the Tribunal applies the matters identified in decision in Slade.

56.41.1 The Tribunal is satisfied that this case is such as to make it just and equitable to award an uplift.

56.41.2 Such are the failures on behalf on the respondent in this case, that the Tribunal considers a just and equitable percentage to be 25%.

56.41.3 The Tribunal has considered whether there is any overlap or 'double-counting' with other general awards. Some of the above failures could have been included in the Tribunal's consideration of an award in respect of injury to feelings/aggravated damages but (apart from the matters in the first two of the above sub-paragraphs that have already been discounted as referred to above) they have not been addressed there. Addressing the remainder of the above failures at this stage is therefore considered appropriate and reasonable and the Tribunal is satisfied that the uplift of 25% does not overlap with other general awards referred to above.

56.41.4 Applying "a final sense-check", the Tribunal is satisfied that the sum of money that is likely to be represented by that percentage of 25% is not disproportionate in absolute terms.

56.42 In summary of the above considerations, the Tribunal is satisfied, with reference to section 207A of the above Act, that the respondent failed to comply with the Code in relation to both the disciplinary process and the grievance process and that that failure was unreasonable. Further, the Tribunal considers it just and equitable in all the circumstances of this case to apply an increase of 25%.

Detailed calculations

57. As has been referred to several times above, the approach of the Tribunal in this Judgment has been limited to addressing the principles in issue rather than making the detailed calculations. In this regard, although acknowledging that both representatives referred to such matters as the Ogden Tables and the decision of the Court of Appeal in Chagger v Abbey National plc [2009] EWCA Civ 1202 CA, the Tribunal considers that those matters are more applicable to the detailed calculations and, as such, it has not addressed those matters at this stage.
58. A final consideration is that in making the detailed calculations either as between the parties or at a future remedy hearing, the claimant has acknowledged that he will give credit for the interim payment of £50,000 referred to above, which is recorded at paragraph 27 of the Orders of this Tribunal that were sent to the parties on 7 March 2022.

Judgment

59. The remedies that the Tribunal may award the claimant in this case are provided for in section 124 of the Equality Act 2010, which is set out in full above. Section 124(5) provides that the Tribunal must not make an order under subsection (2)(b) [*compensation*] unless it first considers whether to act under subsection (2)(a) [*declaration*] or (c) [*recommendation*].

60. In its Liability Judgment, the Tribunal has already made a declaration under subsection 124(2)(a) and in its deliberations following this remedy hearing considered making a recommendation under subsection 124(2)(c) but does not do so, not least because a recommendation was not sought by the claimant.

61. In the above circumstances, the unanimous Judgment of this Tribunal is that, if the parties fail to reach agreement between them, it will make an order under subsection 124(2)(b) that the respondent pay compensation to the claimant which (subject to any additional submissions that might be made at a further remedy hearing) will be calculated having regard to the principles outlined in the above Reasons.

A further remedy hearing

62. It is intended that this approach of addressing the principles in issue rather than making the detailed calculations will enable the parties to undertake the necessary calculations and agree figures between themselves but, if not, a further remedy hearing will be required.

63. That being so, the parties are required to write to the Tribunal no later than four weeks after the date upon which this Judgment is sent to them to state whether agreement has been achieved and, if not,

    63.1 to identify clearly the issues that remain in dispute between them, and

    63.2 to provide an estimate as to the length of the further remedy hearing.

64. The Tribunal Office will then make arrangements for a further remedy hearing as soon as practicable thereafter.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 February 2023